United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

original

75-7259

IN THE

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 75-7259

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P/5

FRANK LOWELL,

Plaintiff-Appellant,

—against—

TWIN DISC, INCORPORATED,

Defendant-Appellee.

BRIEF FOR DEFENDANT-APPELLEE

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Preliminary Statement

This is an appeal by plaintiff-appellant from a Memorandum of Decision and Order of Chief Judge Jacob Mishler directing the entry of partial summary judgment dismissing the Complaint herein and denying plaintiff-appellant's motion for leave to serve an Amended Complaint, as well as from the judgment entered pursuant to said Order on April 1, 1975. (273a-279a, 291a)*

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* Citations to the Joint Appendix on this appeal are referred to as "__a". Citations to the Appendix and Cross-Appendix on appeal in the action *Frank Lowell* v. *Lem Instrument Corp.* (Sup. Ct. Suffolk Cty., 73-1733) are referred to as "App. __" and "D. App. __" respectively.

Issues Presented

1. Whether the District Court properly granted defendant-appellee's motion for partial summary judgment dismissing the Complaint where there were no genuine issues of material fact and the purported causes of action asserted therein were barred by the prior judgment in the action *Frank Lowell* v. *Lem Instrument Corp.* (Sup. Ct. Suffolk Cty. 73-1733)?

2. Whether the District Court was correct in refusing to grant plaintiff-appellant leave to file the proposed Amended Complaint where the proposed Amended Complaint, like the original Complaint, would be subject to dismissal and plaintiff-appellant had been guilty of laches?

Statement of the Case

Plaintiff-appellant Frank Lowell ("Lowell") has failed to set forth the factual background out of which this litigation arose. As a consequence, defendant-appellee Twin Disc, Incorporated ("Twin Disc") is impelled to set out that background at some length.

The Factual Background

On December 15, 1967, Lowell, as President of Lem Instrument Corp. ("Lem"), wrote a letter to Twin Disc indicating that the owners of Lem would be interested in pursuing a business relationship with Twin Disc. Specifically, Lowell stated that ". . . we find that our capital resources are inadequate for our very ambitious, but well

conceived plans for explosive growth. . . . Consequently, we are receptive to any equitable arrangement that can produce what is required." (D. App. 1-2) In response to this request, Twin Disc entered into negotiations with Lowell and his then partner, Robert Everett ("Everett"), and on July 3, 1968, negotiations were concluded. (App. 13) On that day a stock acquisition agreement ("acquisition agreement") was signed—between Lowell and Everett, on one side, and Twin Disc on the other. Lowell and Everett received from Twin Disc $100,000 and $50,000 worth of Twin Disc stock respectively in exchange for all the outstanding shares of Lem stock. (165(a); App. 13) Simultaneously, as part of the same transaction, employment agreements were executed by Lowell and Lem and by Everett and Lem which were guaranteed by Twin Disc. (191a-198a; App. 14, 170-173, 634-636) (The employment agreements expressly referred to the acquisition agreement.*)

At the time of the acquisition, Lem was a small manufacturing facility consisting of about 2,200 square feet, slightly larger than a courtroom. (App. 249, 320, 579) Its only two employees were Lowell and Everett (App. 579) who were thought to be its principal asset. Twin Disc's minutes of a board of directors meeting on March 21, 1968 stated in part: ". . . [I]n essence Twin Disc is purchasing two men who have developed a miniaturized clutch and now are in the initial marketing stages." (App. 17, 579-580)

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* Whereas, all of the capital stock of Lem is being acquired by Twin Disc, Incorporated ("Twin Disc") a Wisconsin corporation, pursuant to a Stock Acquisition Agreement between Lowell, and Robert Everett, and which will result in Lem operating as the wholly owned subsidiary of Twin Disc. (191a)

From the outset, Lem's performance under Lowell's management was dismal; it soon became disastrous. Indeed, during his employment Lowell referred to Lem's performance as "horrible", "disappointing" and "unsatisfactory." (App. 625, 627, 629, 633)

During the period from July 3, 1968 to October 1972, the sales effort and the sales picture were so bad that there were 12 separate months in which no sales were made, 6 separate months in which sales were only a few hundred dollars and no months in which sales exceeded $13,344. (App. 194-95, 642) When Twin Disc hired Gordon Danhoff, at its expense, to help with Lem's paltry sales, Lowell refused to cooperate with him and denied potential customers sales information. (App. 405-09, 423-25) While this was happening Twin Disc was pumping more than $482,000 in capital into Lem (App. 345); nevertheless, Lem's accumulated losses during that period totalled $256,190. (App. 142)

Despite this terrible performance, Lowell evidenced repeated and unfounded optimism. First he projected sales of $300,000, later $46,800, $131,000, $200,000 and finally $132,400. At no time did the sales even remotely approach his preposterous estimates. (144a-145a)

Lowell, who has a very abrasive personality, had trouble getting along with fellow-employees. In May 1971, Lowell fired Mr. Samuel, the inventor of the only Lem product of any real value. (App. 34, 248, 258, 318) According to Mr. Samuel and Everett, Lowell was continually making loud and insulting remarks about Mr. Samuel. (App. 252-55; 321-24) According to both Messrs. Samuel and Everett, Lowell was in the habit of calling them "schmucks",

"incompetent idiots", and other equally derogatory names. (App. 266, 320-21, 325)

In early 1972 Lowell fired Mr. Edward Coruzzi, the man he had hired as successor to Mr. Samuel. (App. 262-63) Then on August 11, 1972 Lowell handed Everett a written notice of discharge, and went on vacation, leaving the two remaining employees, who had no executive or administrative experience, without a supervisor. (App. 163-64)

In October 1972, the board of directors of Lem, faced with repeated and consistent losses, with staff demoralized by Lowell's abusive attitude and with a non-existent sales force (App. 378-80) had no choice but to close down the operations of Lem and to discharge Lowell for failure to perform his job "faithfully and diligently" as required by the terms of his employment agreement. (App. 571) While Lem ceased to do business, it has remained a corporation in good standing, and, except for a few minor items, Lem's assets, including a pending patent application, have not been sold and Twin Disc still owns all of Lem's stock. (272a)

Throughout the period of his employment Lowell was being paid $35,000 per year—and by October 1972 had been paid over $157,000. (App. 155-56) Not satisfied with this large sum and the additional $100,000 worth of Twin Disc stock he had received (and presumably still owns), Lowell embarked upon a vendetta of litigation against his erstwhile benefactors.

The Prior Legal Proceedings

This action was commenced in October 1972 in the Supreme Court of the State of New York, County of Suffolk. Twin Disc removed the action to this Court, there being diversity of citizenship.

The original Complaint purports to state three causes of action. (55a-62a) The first alleges that Twin Disc executed the guaranty of Lowell's employment agreement and that Lem breached the employment contract and terminated Lowell without cause. $250,000 in damages are sought. The second cause of action repeats and realleges the first cause of action and seeks certain fringe benefits allegedly not paid. $50,000 in damages are sought.

The third cause of action repeats and realleges the first cause of action and then asserts that "on July 3, 1968, at the time said employment contract and said guaranty agreement were executed", Twin Disc executed the acquisition agreement. The Complaint then alleges that Twin Disc breached the acquisition agreement by not offering Lowell an opportunity to obtain additional shares of stock of Twin Disc (through an earn-out) and by selling or disposing of Lem's assets without giving Lowell a right of first refusal. Damages in the amount of $250,000 are sought.

On January 2, 1973 Lowell commenced a second action in the Supreme Court of the State of New York, County of Suffolk. (State court action) This time Lem was the defendant. The Complaint in that action purports to state two causes of action for breach by Lem of the employment agreement. The causes of action are identical to the first two in the Complaint in this action, save that the guaranty is not referred to. Damages in the amount of $250,000 and $50,000 are sought.

Lem's amended answer alleges that Lowell failed to perform the conditions precedent on his part to be performed, was discharged for cause, and failed faithfully and diligently to manage Lem. (82a-86a) Eleven specific failings on Lowell's part were pleaded.* After Lem's amended answer was served, Lowell rushed the case to trial, waiving all discovery and putting the action on the calendar just eight weeks after its commencement. (39a)

Just ten months after its commencement, the State court action was tried before Hon. John F. Scileppi and a jury on October 9, 10, 11 and 12, 1973. (39a) The transcript of the testimony at trial is set forth at App. 1-565. The sole witness on Lowell's behalf was Lowell. Messrs. Everett and Joseph Samuel, two former employees of Lem who had worked closely with Lowell, Mr. Gordon Danhoff—who had also worked with Lowell at Lem (although paid by Twin Disc) and Messrs. John Batten and Wilton B. Gibson, two directors of Lem and officers of Twin Disc, testified at trial for Lem.

At trial Lem adduced testimony and other substantial evidence to support its position that Lowell mismanaged Lem and that Twin Disc's massive infusion of capital was

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* They are that Lowell failed: "(1) to achieve the level of performance anticipated for Lem in the 'Operation Plans', (2) to achieve any profits for Lem, (3) to meet his sales forecast, (4) to supervise properly the employees of Lem, (5) to retain manufacturers' representatives, (6) to timely pay accounts payable, (7) to report to his superiors, (8) to develop markets and products adequately, (9) to deal with the personnel of Lem harmoniously and in the best interests of the Company, (10) to deal with the customers of Lem harmoniously and in the best interests of the Company and (11) to provide proper leadership for Lem." (84a-85a)

to no avail. Lowell tried to counter this testimony in a variety of ways.

He suggested that Twin Disc had conspired to discharge him so as to avoid its obligations on the guaranty. He put in evidence (App. 608) the same memorandum referred to in support of his motion for leave to serve an Amended Complaint. (13a) Illustrative of the importance Lowell placed on this exhibit is the following statement he made in his brief to the Court of Appeals in support of his motion for leave to appeal to that Court:

> "Plaintiff submits that the real reason for his discharge by defendant, which lost money from the inception of his *seven*-year employment contract in July 1968 (Ex. 2, 571-6) to his unwarranted discharge in October 1972, is found in a most revealing inter-office communication, marked 'personal and confidential', of Twin Disc, Incorporated, the conglomerate which became the owner in July 1968 of defendant's shares of stock through purchase thereof from plaintiff and his *quondam* associate, one Everett (Ex. 28, 608-9). Plaintiff's employment contract with defendant was guaranteed by Twin Disc [Ex. 2, 577]. This memorandum, entitled 'Lem Divestiture *Strategy*' and dated October 7, 1971—one year before plaintiff's trumped-up discharge—is so revelatory of defendant's early designs to get rid of plaintiff, that we take the liberty of quoting from it *in extenso* (609):"

Lowell then quoted from the exhibit at length. (106a-108a)

He also extensively cross-examined Mr. Batten as to the minutes of the meetings of Lem's board of directors and its sole shareholder Twin Disc and claimed that the meetings were improperly held. (App. 379-389) In addition, he urged that Twin Disc was fully aware that it was acquir-

ing the services of only two men and not any products and that any losses were the result of a decision to use Lem for research and development—and not of his incompetence. (*e.g.*, 126a)

After only 78 minutes of deliberation the jury in the State court action returned a unanimous verdict in favor of Lem and against Lowell. (App. 562) A brief summary of the evidence adduced at trial was set forth in the Kheel moving affidavit. (41a-44a) A detailed discussion of such evidence is contained in Lem's brief to the Court of Appeals in opposition to Lowell's motion for permission to appeal. (143a-150a)

The judgment entered upon the jury verdict was unanimously affirmed by the Appellate Division, Second Department. Lowell's motions for leave to appeal to the Court of Appeals were unanimously denied by the Appellate Division and by the Court of Appeals. Obviously the jury verdict and its affirmance were not just a refutation of Lowell's claim that he was wrongfully discharged; they were necessarily also a rejection of the diverse contentions he urged in defense of his position.

Despite all of this, Lowell refuses to recognize that it was *his* patent shortcomings which caused Lem's losses and that his distorted, erroneous perception of reality has been rejected. After the Court of Appeals denied him leave to appeal from the judgment in the State court action, Lowell flew to Wisconsin without informing Twin Disc's attorneys (or his own), and sought a meeting with Twin Disc's president. At this meeting he indicated that unless Twin Disc met his exorbitant and bizarre demands

he would continue his litigation.* Shortly thereafter, Lowell's motion for leave to serve an Amended Complaint was served. (6a)

The proposed Amended Complaint (16a-22a) deletes the first two causes of action of the Complaint and apparently segregates out portions of the third. In their stead, Lowell's proposed Amended Complaint would have substituted six purported causes of action seeking a total of $1,733,000 in damages, or three times as much as was sought in the original Complaint or in the State court action.

The first proposed cause of action again sets forth that Twin Disc entered into the acquisition agreement "at the same time and place" that Lem entered into its employment contract with Lowell which was guaranteed by Twin Disc. It asserts that Lowell was wrongfully discharged "without cause" as a director of Lem (17a par. 5) and that, but for his discharge as director, the remaining directors of Lem (all employees of Twin Disc) would not have fired him for cause as the president and general manager of Lem. (17a par. 8) Significantly, nowhere in his brief to this Court does Lowell discuss this proposed cause of action.

Lowell's proposed second cause of action alleges that Twin Disc "devised a plan in bad faith to contrive an artificial and fraudulent excuse" for having Lem discharge him (18a par. 12) and then makes the incredible averment

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* Lowell asserts in his brief that Twin Disc's receptiveness to negotiation indicates a "corporate consciousness" that Twin Disc was "still obligated to plaintiff under the acquisition agreement." (Br. 26) Twin Disc offered at the pre-argument conference to exchange releases with Lowell and to sell him Lem's assets at their fair market value in an effort to end this expensive and ill-considered litigation. This offer is certainly no recognition that his claims have merit.

that Twin Disc (and by implication, its attorneys) suborned perjury by "inducing Everett by promises of reward . . . to testify falsely." (18a par. 14) As with the first proposed cause of action, Lowell nowhere discusses this proposed cause of action in his brief to this Court.

The third proposed cause of action repeats the allegations of the first and second causes of action and then alleges that by "prematurely terminating the business of Lem" (19a par. 19), Twin Disc deprived Lowell of an opportunity to receive additional shares of Twin Disc stock in violation of the acquisition agreement. In this respect it is similar to a portion of the third cause of action of the Complaint.

The fourth proposed cause of action repeats and realleges the allegations of the first, second and third proposed causes of action. It then alleges that by the terms of the acquisition agreement, Twin Disc agreed to make alternate employment available to Lowell in New York in the event of a sale of Lem and that in breach of such agreement, no such offer was made. (20a) No reference is made to the paragraph of the acquisition agreement where this obligation is supposed to have been assumed. In fact, in a reply affirmation, Lowell's attorney attempted to amend this proposed count to allege that this obligation to provide alternative employment was contained in the guaranty agreement rather than in the acquisition agreement. (248a)

The fifth proposed cause of action claims a right of first refusal on Lowell's part in the event of a sale or dissolution of Lem. (20a-21a) It then alleges a sale of the assets in violation of such a right. Like the third proposed cause of action, this is similar to a portion of the third cause of action of the Complaint.

The sixth proposed cause of action asserts a failure by Twin Disc to use its best efforts to keep Lem's business intact in violation of paragraph 17 of the acquisition agreement. (21a)

Obviously, Lowell has attempted to draft his proposed Amended Complaint so as to avoid the impact of the judgment in the State court action. Nevertheless, his moving papers below (and his brief here) repeatedly raise the same issues as have been put to rest in that action.*

In paragraphs 6-9 of his moving affidavit (10a-12a) Lowell recites that Twin Disc "contrived" to fire him, that Lem was on the "threshold of substantial profitability" and that he was discharged "without justification in fact." And in his reply affidavit, he asserts that: "[T]here was no proof whatever that those [Lem's] losses were due to any shortcomings on my part or constituted a breach of any agreement I made" (228a) and "it was never alleged or proved in that action that I did not perform 'competently.'" (236a)

As throughout the State court action, Lowell's moving papers urge that Lem's large losses were not his fault; that he was wrongfully removed as a director of Lem and wrongfully discharged as an officer and employee; that economic factors caused Lem's problems and that the directors of Lem, who are also officers of Twin Disc, trumped up his discharge.

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* As if to underscore the identity of these actions, all the exhibits annexed to the proposed Amended Complaint and Lowell's moving affidavit are copies of exhibits which were marked in evidence in the State court action. (13a-15a, 23a-25a)

We shall show, however, the three causes of action in the Complaint and the six purported causes of action in the proposed Amended Complaint are barred by the judgment in the State court action against Lowell and in favor of Lem and in any event, fail to raise a genuine issue of material fact.

ARGUMENT

POINT I

Summary Judgment Was Correctly Granted Dismissing the Three Causes of Action Set Forth in the Complaint.

A. *The First and Second Causes of Action*

Lowell concedes that the judgment in the State court action renders the first two causes of action of the original Complaint in the case at bar subject to dismissal on the ground of *res judicata*. (8a, 216a) In any event, there can be no doubt that these two causes of action involve the identical issues resolved in Lem's favor in the State court action. It follows that Lowell is barred from the maintenance of these two causes of action. See *Zeldman* v. *Celebrezze*, 252 F. Supp. 167, 171 (E.D.N.Y. 1965).

The plea by Twin Disc of a former judgment is patently proper in the present case. Even though Twin Disc was not technically a party to the State court action, it is entitled to the benefits of the judgment therein. *See B. R. DeWitt, Inc.* v. *Hall*, 19 N.Y.2d 141, 278 N.Y.S.2d 596 (1967); *Israel* v. *Wood Dolson Co.*, 1 N.Y.2d 116, 151 N.Y.S.2d 1 (1956). Indeed, even aside from the well-settled authority relating to *res judicata* and collateral estoppel, Twin Disc, as guarantor of Lem's obligations, has been discharged under the

law of suretyship as a result of the judgment in favor of Lem in the State court action.

> "... [I]f the surety's obligation is merely to answer for a debt or default of the principal, a judgment in favor of the principal in an action brought by the creditor establishes that the principal is not liable on the obligation, or that as between them there has been no debt or default, provided the principal's successful defense was on the merits of the creditor's claim." 57 N.Y. Jur. *Suretyship and Guaranty* §242, at 604 (1967) (footnote omitted).

Accord, People v. *Metropolitan Surety Co.*, 171 App. Div. 15, 156 N.Y.S. 1027 (3d Dep't 1916).

B. *The Third Cause of Action*

As indicated above, in the third cause of action of the Complaint, Lowell claims that he was wrongfully discharged as an officer and employee of Lem, that Twin Disc breached the acquisition agreement (1) by denying Lowell a right to acquire Lem prior to the sale of its assets to a third party and (2) by terminating Lem's operations, thereby destroying Lowell's opportunity to receive additional shares of Twin Disc stock based on Lem's future profits.

In the first place, as Chief Judge Mishler recognized, the judgment in the State court action conclusively established that the discharge of Lowell and the termination of Lem's business were justified. Since the employment agreement and the acquisition agreement were executed as part of a single transaction, it follows that a breach by Lowell of one terminated Twin Disc's obligations under both. Obviously, there would have been no employment contract if there had

not been an acquisition and, equally obviously, there would have been no acquisition without an employment contract. Lowell cannot now maintain that he is entitled to recover damages for violation of rights which ceased to exist with his lawful discharge and the closing of Lem's business. *See Vernitron Corp.* v. *Benjamin,* 440 F.2d 105 (2d Cir. 1970), *cert. denied,* 402 U.S. 987 (1971); *Israel* v. *Wood Dolson Co.,* 1 N.Y.2d 116, 151 N.Y.S.2d 1 (1956); *Byrd* v. *Meadow Gold Products Corp.,* 60 Misc.2d 212, 302 N.Y.S. 2d 701 (Sup. Ct. Kings Co. 1969).

In an attempt to avoid this dispositive fact Lowell in a surreply affidavit in opposition to the motion for summary judgment asserted that the agreements were not interdependent. (263a) He thus tries to create an issue of fact. But whether the agreements were part of a single transaction and interdependent, under the circumstances of this case, is a matter for judicial determination. *Bethea* v. *Investors Loan Corp.,* 197 A.2d 448 (D.C. Ct. App. 1964). All the facts and circumstances bearing upon that determination were before Chief Judge Mishler when he held that Lowell's rights under the acquisition agreement were "conditioned upon plaintiff's continued status as an employee [of Lem] in good standing." (274a) The evidence showed that the acquisition agreement and the employment agreement were negotiated together; they were executed at the same time and place (both the original and Amended Complaint allege this). (16a, 57a) The employment agreement refers to the acquisition agreement, the guaranty agreement guarantees Lem's performance of the employment agreement. As also indicated, the minutes of the meeting of the board of directors of Twin Disc reflect that it was acquiring two men—nothing more. Significantly,

Lowell himself admitted earlier in this action that these agreements were "part of the same transaction". (Mem. in Support of Plaintiff's Motion for Summary Judgment, p. 1)

It is of course true that the burden of showing an absence of any material factual issue is upon a party seeking summary judgment. However, the evidence submitted by Twin Disc placed upon Lowell the burden of coming forward with evidential material—not just theories or self-serving statements—sufficient to indicate that genuine issues of fact remain for trial. Such a shifting of the burden upon a summary judgment motion is mandated by the express provision of Rule 56(e) of the Federal Rules of Civil Procedure, which reads, in relevant part:

> " . . . When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him."

As was stated in *Beal* v. *Lindsay,* 468 F.2d 287, 291 (2d Cir. 1972):

> "The rule . . . that summary judgment may not be rendered when there is the 'slightest doubt' as to the facts no longer is good law. When the movant comes forward with facts showing that his adversary's case is baseless, the opponent cannot rest on the allegations of the complaint but must adduce factual material which raises a substantial question of the veracity or completeness of the movant's showing or presents countervailing facts." (citations omitted)

Accord, Donnelly v. *Guion,* 467 F.2d 290, 293-94 (2d Cir. 1972); *Robin Construction Co.* v. *United States,* 345 F.2d 610, 613-14 (3d Cir. 1965); *Strother* v. *Great Notch Corp.,* 57 F.R.D. 113 (D.N.J. 1972). Lowell's belated and self serving allegation that there could have been an acquisition agreement without an employment agreement simply does not qualify as "factual material" which raises a "substantial question of the veracity" of the moving papers. Chief Judge Mishler was clearly correct in determining that Lowell's breach of the employment agreement terminated any remaining rights under the acquisition agreement.

In addition to the foregoing, there are other reasons why the third cause of action of the Complaint was properly dismissed.

Lowell's "Right" to Reacquire Lem's Stock or Assets

The acquisition agreement conferred a right of first refusal on Lowell and Everett in the event Lem's stock or assets were sold. But, contrary to the implication in paragraph 22 of the Complaint, Lowell received an opportunity to acquire Lem, which he wholly failed to exercise. (52a) On October 9, 1972 Twin Disc offered to sell to Lowell the assets of Lem. Lowell concedes that he did not accept this proposal (App. 80, 238a). Moreover, it is uncontroverted and uncontrovertible that the option conferred upon Lowell by the acquisition agreement by its terms terminated as of June 30, 1975 and as of that date Twin Disc had not sold the assets of Lem.* (271a-272a)

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* Chief Judge Mishler adopted the phrase "dissolution of Lem" as a short hand to describe the cessation of Lem's business activity. Lowell's brief ascribes great significance to this phrase and charges (Br. 16-17) that counsel for Twin Disc repeatedly used it and led Chief Judge Mishler into doing so. This is absolutely incorrect as the record references in Lowell's brief will show. The indisputable fact is that Lem ceased doing business, but still exists as a corporation and still owns substantially all of its assets and Twin Disc still owns all the outstanding shares of Lem. (271a-272a)

Lowell's "Right" to Acquire Additional Stock of Twin Disc

The acquisition agreement provided that Lowell and Everett were entitled to shares of Twin Disc stock equal to 25% of pre-tax earnings of Lem "for each fiscal year *after the deduction of accumulated operating losses incurred subsequent to April 18, 1968*". (165a-166a) (emphasis added) Since Lem's accumulated operating losses for the four and one-half year period prior to Lowell's discharge exceeded $256,000, Lem would have had to have pre-tax earnings equal to that amount before any bonus would have been payable. In light of the appalling history of Lem's business subsequent to its acquisition by defendant, it is absurd speculation to assert that Lem's profits could, in the less than three years remaining under the acquisition agreement, have reached a level entitling Lowell to the receipt of additional shares of stock in accordance with that agreement. And certainly it could not be established by competent proof that the profits would have reached that level. (49a-50a)

In summary, the pleadings and the evidence demonstrate that Lowell's claims are not only foreclosed by the verdict against him in the State court action, but are also completely lacking in substance. Accordingly, the judgment below dismissing the original Complaint should be affirmed in all respects.

POINT II

Because the Proposed Amended Complaint Would Have Been Subject to Dismissal and Because Lowell Was Guilty of Laches, the Court Below Correctly Denied Lowell's Motion for Leave to Serve an Amended Complaint.

Despite the liberality with which leave to amend is granted, allowing amendment upon the facts in the present case would be both inappropriate and inequitable. Amendment would be a futile gesture and should not, in any case, be permitted because of Lowell's laches in delaying his motion for leave to file an amended and supplemental Complaint.

A. *Futility of Amendment*

The proposed Amended Complaint does not alter Lowell's original pleadings in any material respect. The claims asserted in the proposed Amended Complaint would be barred for the same reason as those asserted in the Complaint, and amendment would be a fruitless act.

An essential element of the first, second and fourth causes of action asserted in the proposed Amended Complaint is the alleged impropriety of Lowell's discharge by Lem—an issue already fully adjudicated on the merits in the State court action.

The First Proposed Cause of Action

Lowell emphasizes the fact that Twin Disc removed him as a director of Lem. He disingenuously suggests that, had he not been so removed, he could have persuaded Lem's board of directors (who were all Twin Disc employees)

not to discharge him. (9a; 17a par. 8) In addition, he urges that the meeting of Lem's board of directors was illegal. But, Twin Disc's obligation to elect Lowell to Lem's board of direc is contained in its guaranty of his employment contract (23a) and was limited to the life of that agreement. This is the agreement which Lowell was found in the State court action to have breached. Plainly Twin Disc is entitled to rely in justification of Lowell's removal as a director of Lem on the same substantial evidence of Lowell's shortcomings adduced at the State court trial to support Lem's discharge of him as an officer and employee. Apart from this, the question of whether the remaining directors of Lem had authority to discharge him or wrongfully discharged him, or whether they would have done so if he were still on the board, has already been adjudicated. At trial in the State court action, both the minutes of the shareholders meeting and those of the board of directors meeting were marked in evidence. (D. App. 48-50) In that action, Lowell urged upon the Court and jury that the board of directors of Lem—as then constituted—lacked authority to discharged him. He cannot be heard to complain about that again.

The Second Proposed Cause of Action

Equally futile is Lowell's attempt in his proposed second cause of action to circumvent the result of the State court action by claiming that he is entitled to damages because of a fraudulent scheme by Twin Disc to discharge him wrongfully. This claim is predicated on a document specifically introduced in evidence in the State court action, and Lowell recites here the same litany of unfounded allegations that he urged in that action. Indeed, as discussed above (pp. 8-9), in his motion in the Court of Ap-

peals for leave to appeal to that Court, Lowell quoted "in extenso" from that very document and urged that the same purported scheme, not Lowell's numerous shortcomings, was the "real reason" for his discharge. (106a-108a)

Moreover, the plain fact is that Twin Disc poured money into Lem until October 1972, after Lowell had fired Everett, and by that time the situation was obviously hopeless. Indeed, Lowell himself testified in the State court action that, despite the receipt of cash advances from Twin Disc in the amount of $482,000, Lem lost money from the date of Twin Disc's acquisition of Lem's stock to the date of his discharge. (App. 152-154) Twin Disc's president, John Batten, was cross-examined in the State court action about the so-called "plan" (App. 390-393) and, as indicated above, Lowell relied extensively, if unsuccessfully, on this excuse to try to avoid (and explain) his shortcomings.

The Fourth Proposed Cause of Action

The proposed Amended Complaint (par. 23) alleges that, as part of the acquisition agreement, Twin Disc guaranteed Lowell employment in New York in the event that Lem closed down. Lowell has conceded that this is not so and in his reply papers sought to amend this proposed count to refer to the guaranty of his employment contract. (248a) As indicated this guaranty agreement does contain such language, but it is effective only for the "life of the agreement." Once the employment agreement was terminated with justification, Lowell ceased to have any rights under the guaranty of that agreement.

The jury verdict in the State court action destroys the foundation of any charge of a fraudulent scheme by Twin Disc or any of its employees, or of any obligation on Twin

Disc's part to keep Lowell on Lem's board of directors or to provide him alternate employment upon the termination of Lem's business. Since these issues were litigated in the State court action, the judgment there bars Lowell's assertion of the first, second and fourth causes of action of the proposed amended complaint:

> "A judgment in one action is conclusive in a later one not only as to any matters actually litigated therein, but also as to any that might have been so litigated, when the two causes of action have such a measure of identity that a different judgment in the second would destroy or impair rights or interests established by the first. . . ." *Schuylkill Fuel Corp* v. *Nieberg Realty Corp.*, 250 N.Y. 304, 306-07 (1929).

Accord, Buchanan v. *General Motors Corp.*, 158 F.2d 728, 730 (2d Cir. 1947) ("[T]he usual rule as to the effect of a former judgment . . . is that the judgment is *res judicata* not only as to all the issues decided but also as to all that could have been"); *Siegel* v. *National Periodical Publications, Inc.*, 364 F. Supp. 1032, 1036 (S.D.N.Y. 1973) ("[T]he issues which plaintiffs want to litigate in this action could have been raised in the . . . [state court] action, and consequently are barred by *res judicata* . . . ").*

The Third and Fifth Proposed Causes of Action

The third and fifth causes of action of the proposed Amended Complaint (which repeat and reallege the first two proposed causes of action) allege claims identical to

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* Lowell brief (pp. 19-20) argues that the claims asserted against Twin Disc in this action could not have been asserted in the State court action. This is nonsense. Lowell could have joined Lem and Twin Disc as defendants in a single action and could have asserted all his fancied grievances against both of them in that single action.

those asserted in the third cause of action of Lowell's original pleading.

The discussion, *supra*, at pp. 14-18 disposes of these purported claims. It is worth noting, however, that before Lowell would have been entitled to the $233,000 he seeks in damages in the fifth proposed cause of action, Lem would have had to earn a pre-tax profit of over $1,250,000 in the less than three years remaining life of the acquisition agreement. Inasmuch as under Lowell's management Lem lost an average of $66,000 per year, such a possibility is highly speculative and is not susceptible of proof. Indeed, it is inconceivable.

The Sixth Proposed Cause of Action

This cause of action alleges that Twin Disc breached a best-efforts obligation to keep Lem in business. As the evidence at trial showed, Twin Disc poured in $482,000 in contributions to capital to keep Lem afloat. Only after it became clear that Lem's success under Lowell's stewardship was impossible did Twin Disc close Lem down. A better faith effort is scarcely imaginable. In any event, this purported claim is no more than another way of restating the claim—raised in the third cause of action of the original pleading and the third cause of action of the proposed Amended Complaint—that Twin Disc terminated Lem's business without justification and prematurely and that Lowell was damaged thereby through loss of his opportunity to receive additional stock pursuant to the acquisition agreement.

The aforesaid causes of action of the proposed Amended Complaint (Third, Fifth and Sixth) are transparently the same in substance as claims asserted in the third cause of

action of the original pleading, a cause of action that—as previously urged in Point I, *supra*,—was properly dismissed by the District Court.

Under these circumstances, leave to amend should not be granted. The Court of Appeals for the Fifth Circuit has succinctly stated the relevant rule in *DeLoach* v. *Woodley*, 405 F.2d 496 (5th Cir. 1969):

> "The liberal amendment rules of F.R. Civ. P. 15(a) do not require that courts indulge in futile gestures. Where a complaint, as amended, would be subject to dismissal, leave to amend need not be granted." 405 F.2d at 496-97.

Accord, Billy Baxter, Inc. v. *Coca-Cola Co.*, 431 F.2d 183, 189 (2d Cir. 1970), *cert. denied*, 401 U.S. 923 (1971); *Thermal Dynamics Corp.* v. *Union Carbide Corp.*, 42 F.R.D. 607, 609 (D.N.H. 1967) (amendment denied where facts forming factual basis for amendment had been raised in previous case); *Kaplan* v. *United States*, 42 F.R.D. 5, 7 (C.D. Cal. 1967) (motion to amend after several months denied where moving party did not present a *prima facie* meritorious claim).

Since all of the causes of action alleged in the proposed Amended Complaint would have been barred, amendment would have served no purpose and was properly denied.

B. *Lowell's Laches*

Laches is a proper reason for denial of leave to amend, particularly when amendment is sought several years after the complaint was filed. *See Wheeler* v. *West India S.S. Co.*, 205 F.2d 354 (2d Cir. 1953). All facts alleged in the proposed amended complaint were known by Lowell *prior*

to trial in the State court action. (53a) Indeed, he used discovery in this action as a vehicle to obtain evidence for use in that action after he had waived any rights to discovery in that action. (53a) He could have sought amendment in this action long before he did.

Lowell's excuse for this failure to move more promptly is that he "believed it was inappropriate and untimely to amend the existing Complaint until the result of the State court action became final." (8a) To the extent that this statement implies that he was unaware prior to trial in the State court action of the facts upon which his motion here is predicated, Lowell attempted to mislead the Court. He chose not to amend in 1973 because he thought he would win in the State court action. He was wrong. Now, having fully and unsuccessfully litigated in the State court action, he wants another bite out of the apple.

Lowell has tried to advance various theories for recovery that he hoped were superficially different enough from his previous claims to persuade the District Court to permit him another chance. Chief Judge Mishler saw through this sham, and after reviewing the lengthy record, entered judgment adverse to Lowell.

As a result, Lowell's brief to this Court charges Chief Judge Mishler with "embark[ing] upon flights of presumption", "inexplicable" statements, "manifest error" and a "tainted disposition". (Br. 5, 8, 17) This is not surprising. Lowell has an enormous capacity for finding fault with everyone but himself. He has repeatedly refused to recognize that his version of the facts and the law is distorted and myopic. If one Court disagreed, there was always another to which an appeal might be taken. To date, a unanimous jury, two Supreme Court Justices, five Appellate

Division Justices and seven Court of Appeals Judges, together with Chief Judge Mishler, have rejected on the merits Lowell's contentions.

This has been a long and expensive litigation for Twin Disc. It respectfully submits that Lowell has more than had his day in court; that enough is enough; and that Lowell ought not now be permitted to continue his harassment.

CONCLUSION

The determination of the District Court granting summary judgment dismissing the Three Causes of Action of the Complaint, and denying Lowell's motion for leave to serve an Amended Complaint should be affirmed in all respects.

Respectfully submitted,

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